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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

TONY TADAYON, Plaintiff/Counterdefendant/ Appellant/Cross-Appellee, v. KAREN MACKENZIE, Defendant/Counterclaimant/ Appellee/Cross-Appellant.	2 CA-CV 2007-0152 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20064295

Honorable John F. Kelly, Judge

REVERSED AND REMANDED

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B R A M M E R, Judge.

¶1 Appellant, Tony Tadayon, appeals the trial court's grant of a motion to enforce a settlement agreement, which appellee, Karen Mackenzie, asserted she and Tadayon had reached during a settlement conference. We reverse and remand.

Factual and Procedural Background

¶2 The following facts are undisputed. Tadayon and Mackenzie had lived together in her home. After Tadayon moved out of Mackenzie's home, he filed a complaint against her, alleging that he had "made house payments and paid for improvements on [her] home" exceeding $40,000, for which Mackenzie had agreed to reimburse him. Tadayon sought enforcement of that agreement, the return of his personal property still in Mackenzie's possession, and joint custody of their two dogs. Tadayon also requested damages because Mackenzie had allegedly defamed him, "portray[ed] [him] in a false light," and intentionally inflicted emotional distress on him by telling law enforcement officers and others he was a drug dealer. Mackenzie answered and counterclaimed, alleging abuse of process, intentional infliction of emotional distress, and harassment.

¶3 After setting the case for trial, the trial court referred Tadayon and Mackenzie to a settlement coordinator to arrange a settlement conference. The parties attended a settlement conference on August 6, 2007. The judge who had presided over the conference noted in a minute entry:

> The parties agree on ownership of specific property and a specific sum to be paid in full and final resolution of all claims

> and counterclaims in this matter. At the time the settlement was being reduced to writing, however, the parties could not agree on a schedule for payment of the settlement.

Consequently, no final, written settlement agreement resulted.

¶4 Two days after the settlement conference, Mackenzie filed a "Motion to Enforce Settlement Agreement and Motion for Sanctions," asserting the parties had reached an oral agreement at the conference and that, after the agreement had been reduced to writing, Tadayon had attempted to withdraw from the agreement by refusing to sign it. Mackenzie filed a memorandum in support of her motion, but submitted no statement of facts, affidavits, or other evidence of a settlement agreement.[1] Tadayon did not respond to Mackenzie's motion.

¶5 After a hearing, the trial court granted Mackenzie's motion. Considering only the minute entry from the settlement conference and argument by the parties, the court concluded that the parties had reached a settlement agreement and that, as the final resolution of Tadayon's claims and Mackenzie's counterclaims, Tadayon had agreed to pay Mackenzie $30,000 and give her full ownership of their dogs. The court then entered judgment to that

[1]In the memorandum she filed in support of her motion to enforce the settlement agreement, Mackenzie referred to two exhibits she had supposedly attached to the memorandum, one of which was apparently an unsigned copy of the alleged settlement agreement. These exhibits, however, appear nowhere in the record on appeal. The trial court did not refer to them during the hearing on Mackenzie's motion or in its minute entry granting her motion. And, at the hearing on Mackenzie's motion, Tadayon's counsel noted that Mackenzie's memorandum "didn't have any exhibits attached"—a statement Mackenzie did not refute. We therefore cannot assume these exhibits exist.

effect in favor of Mackenzie but denied her request for sanctions against Tadayon. This appeal followed.

Discussion

¶6 Tadayon argues the trial court erred in granting Mackenzie's motion and entering judgment against him. Because Mackenzie's "motion to enforce" required the court to determine that the parties had, in fact, reached a settlement and what its terms were, the motion is properly viewed as a motion for summary judgment. *See Canyon Contracting Co. v. Tohono O'Odham Hous. Auth.*, 172 Ariz. 389, 390, 837 P.2d 750, 751 (App. 1992) (treating motion to enforce settlement agreement as motion for summary judgment because, in granting motion, "[i]n effect, the trial court granted summary judgment regarding the existence and terms of an alleged settlement agreement.").

¶7 "A motion for summary judgment should only be granted if 'there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law.'" *Hourani v. Benson Hosp.*, 211 Ariz. 427, ¶ 13, 122 P.3d 6, 11 (App. 2005), *quoting* Ariz. R. Civ. P. 56(c) (alteration in *Hourani*); *see also Orme Sch. v. Reeves*, 166 Ariz. 301, 306, 309, 802 P.2d 1000, 1005, 1008 (1990) (summary judgment inappropriate when "the evidence presented could lead 'reasonable minds' to draw different inferences therefrom"). We review a trial court's grant of summary judgment de novo and view the facts and reasonable inferences therefrom in the light most favorable to the nonmoving party. *Hourani*, 211 Ariz. 427, ¶ 13, 122 P.3d at 11.

¶8 Tadayon first contends Rule 80(d), Ariz. R. Civ. P., precluded the trial court from granting Mackenzie's motion. It states: "No agreement or consent between parties or attorneys in any matter is binding if disputed, unless it is in writing, or made orally in open court, and entered in the minutes." Ariz. R. Civ. P. 80(d); *see Canyon Contracting Co.*, 172 Ariz. at 391, 837 P.2d at 752 (holding Rule 80(d) applies to settlement agreements).

¶9 As Mackenzie notes, however, Tadayon did not raise this argument in the trial court. In fact, he filed nothing in opposition to Mackenzie's motion. Nonetheless, Tadayon suggests he did not waive the issue, asserting he was not required to respond to Mackenzie's motion because it had "failed to show that she [was] entitled to judgment as a matter of law." *See Schwab v. Ames Constr.*, 207 Ariz. 56, ¶ 16, 83 P.3d 56, 60 (App. 2004) (if evidence provided by movant in support of motion for summary judgment "fails to show an entitlement to judgment, the nonmoving party need not respond to controvert the motion"); *see also Chanay v. Chittenden*, 115 Ariz. 32, 38, 563 P.2d 287, 293 (1977) ("If the papers of the moving party fail to show [s]he is entitled to judgment as a matter of law, the opposing party need not even file an opposing affidavit.").

¶10 But Tadayon also failed to raise the issue at the hearing on Mackenzie's motion—even when it became apparent the trial court was inclined to grant the motion—despite ample opportunity to do so. "A party cannot sit idly by on the presentation of a motion for summary judgment which may well resolve the entire case and fail to urge his defense." *Lujan v. MacMurtrie*, 94 Ariz. 273, 278, 383 P.2d 187, 190 (1963). Rather, a party must timely present legal theories so that the trial court has the opportunity to address

them and rule properly. *See Airfreight Express Ltd. v. Evergreen Air Ctr., Inc.*, 215 Ariz. 103, ¶ 17, 158 P.3d 232, 238 (App. 2007). As Tadayon admits, "had [Rule 80(d)] been called to [the court's] attention," "the motion would have been quickly disposed of." Accordingly, Tadayon has waived this issue on appeal, and we do not address it further. *See Airfreight Express Ltd.*, 215 Ariz. 103, ¶ 17, 158 P.3d at 238-39 (arguments not timely raised in trial court waived on appeal); *Hourani*, 211 Ariz. 427, n.2, 122 P.3d at 11 n.2 ("On appeal from summary judgment, an appellant may not advance new theories or raise new issues to secure reversal.").

¶11 Tadayon next contends that, even if he has waived his Rule 80(d) argument, Mackenzie's motion did not show she was entitled to summary judgment. Mackenzie, in turn, asserts the trial court properly granted her motion because it was "undisputed" that the parties had reached an oral settlement agreement. That Tadayon filed nothing in opposition to Mackenzie's motion would ordinarily allow the court to find undisputed the facts she provided in support of her motion. *See Tamsen v. Weber*, 166 Ariz. 364, 368, 802 P.2d 1063, 1067 (App. 1990). But Mackenzie provided no factual basis for her motion other than the minute entry from the settlement conference. She filed no separate statement of facts, no affidavits, and no other documentary evidence showing that an agreement had been reached or supplying the terms of that agreement. *See* Ariz. R. Civ. P. 56(c)(2) (party moving for summary judgment must "set forth, separately from the memorandum of law, the specific facts relied upon in support of that motion [and] . . . refer to the specific portion of the record where that fact may be found").

¶12 Instead, Mackenzie's motion and accompanying memorandum contained only unsupported assertions that the parties had reached a settlement agreement. Mackenzie repeated those assertions at the hearing on her motion, and the trial court apparently concluded they supported the motion. But a party's assertions in a memorandum or at oral argument are not facts capable of supporting a motion for summary judgment. *See In re 1996 Nissan Sentra*, 201 Ariz. 114, ¶ 6, 32 P.3d 39, 42 (App. 2001) ("'Generally, the "facts" which the trial court will consider . . . in ruling on a motion for summary judgment are those which are set forth in an affidavit or a deposition; an unsworn and unproven assertion in a memorandum is not such a fact.'"), *quoting Prairie State Bank v. I.R.S.*, 155 Ariz. 219, 221 n.1A, 745 P.2d 966, 968 n.1A (App. 1987); *Moretto v. Samaritan Health Sys.*, 190 Ariz. 343, 346, 947 P.2d 917, 920 (App. 1997) ("Under Rule 56, an unsworn and unproven assertion of fact in a memorandum is insufficient to establish that undisputed facts entitle a movant to summary judgment."); *GM Dev. Corp. v. Cmty. Am. Mortgage Corp.*, 165 Ariz. 1, 5, 795 P.2d 827, 831 (App. 1990) ("As a general rule, an unsworn and unproven assertion is not a fact that a trial court can consider in ruling on a motion for summary judgment."); *Borbon v. City of Tucson*, 27 Ariz. App. 550, 551, 556 P.2d 1153, 1154 (1976) ("Summary judgment cannot be granted on the basis of statements of fact in moving party's brief even though they are uncontroverted by an opponent.").

¶13 The only "evidence" Mackenzie provided the trial court in support of her motion was the minute entry prepared by the settlement judge following the settlement conference. Although the contents of the minute entry are undisputed, they do not support

summary judgment in Mackenzie's favor. It is unclear from the minute entry whether the parties had indeed reached a final settlement agreement, and nowhere are the terms of the alleged agreement described. *See Orme Sch.*, 166 Ariz. at 306, 309, 802 P.2d at 1005, 1008; *Nicoletti v. Westcor, Inc.*, 131 Ariz. 140, 142, 639 P.2d 330, 332 (1982) (genuine issue of material fact exists unless "only one inference can be drawn from the undisputed material facts"). The trial court, therefore, erred in granting Mackenzie's motion. *See Hourani*, 211 Ariz. 427, ¶ 13, 122 P.3d at 11.

Disposition

¶14 We reverse the trial court's judgment in favor of Mackenzie and remand the case for further proceedings consistent with this decision.[2] We grant Tadayon's request for an award of reasonable attorney fees on appeal pursuant to A.R.S. § 12-341.01(A), subject to his compliance with Rule 21(c), Ariz. R. Civ. App. P.

J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

JOSEPH W. HOWARD, Presiding Judge

JOHN PELANDER, Chief Judge

[2]Because we reverse the trial court's entry of summary judgment in Mackenzie's favor, we do not address her argument on cross-appeal that the trial court abused its discretion in denying her motion pursuant to A.R.S. § 12-349(A)(3) for sanctions against Tadayon based on his refusal to comply with the alleged settlement agreement. We also deny Mackenzie's request for attorney fees on appeal.